IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 13347 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE D.A.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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SHOKLINGAM KAPPUSWAMI MUDLIYAR - Petitioner(s)
Versus
INDIAN BANK & 2 - Respondent(s)

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Appearance :
MR ASHISH H SHAH for Petitioner(s) : 1,
NOTICE SERVED BY DS for Respondent(s) : 1 - 3.
MR NR PARIKH for Respondent(s) : 1,
MR DHARMESH V SHAH for Respondent(s) : 1,
MR HR PRAJAPATI for Respondent(s) : 3,

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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA

Date : 16/10/2007

ORAL JUDGMENT

1. Rule. The petition is taken up for final hearing and disposal today considering the scope of controversy between the parties. The learned advocates for respondents are directed to waive service.

2. The case of the petitioner is that the petitioner is owner and occupier of Flat No.114/896 situated on Survey No.303, T.P.Scheme No.7, Sarvodaya Nagar, Gujarat Housing Board, Khokhra, Mahmedabad, Ahmedabad. The property in question had been purchased by the petitioner from respondent No.3 under a Registered Sale-Deed dated 21.03.2004 which was registered with the Registering Authority at Serial No.252. The petitioner has challenged the action of respondent-Bank in the form of proceedings under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (the Securitisation Act).

3. The facts which are not in dispute show that on 07.05.1999 respondent No.3 purchased the property from Gujarat Housing Board and a Conveyance Deed was executed. The original title deed which was lodged with the Registering Authority carried deficit Stamp Duty and hence, the Deed was not parted with by the Registering Authority. Such deficit Stamp Duty came to be paid on 23.11.2004 by the petitioner.

4. On 17.06.2005 a supplemental amended Sale-Deed was filed with the Registering Authority.

5. On 21.11.2005 Notice under Section 13(2) of the Securitisation Act came to be issued by respondent-Bank. According to the petitioner, respondent No.3 did not give true facts upon inquiry being made by the petitioner and therefore, the petitioner was constrained to file Civil Suit No.2330 of 2005. In the written statement filed by respondent-Bank the documents, on basis of which the loan was advanced to respondent No.3 by respondent-Bank, were placed on record. The petitioner, therefore, initiated criminal proceedings by filing

appropriate complaint against respondent No.3, and her family members.

6. It appears that in the meantime respondent No.1-Bank moved the Chief Metropolitan Magistrate at Ahmedabad by way of Miscellaneous Application No.275 of 2005 under provisions of Section 14 of the Securitisation Act and on 04.07.2006 an order came to be made by the Chief Metropolitan Magistrate permitting the petitioner-Bank to take possession of the property with help of the Police Authorities. On 29.01.2007, respondent No.1-Bank addressed a communication to the petitioner informing the petitioner about the order dated 04.07.2006 made by the Chief Metropolitan Magistrate. The petitioner sent an appropriate reply on 25.04.2007 to respondent-Bank.

7. The learned advocate for the petitioner has based his case on the fact that though constructive possession of the property has been taken over by respondent No.1-Bank physical possession has not been taken pursuant to order dated 04.07.2006 and this is

because in absence of the original document establishing the right, title and interest in the property being parted with by respondent No.3 in favour of respondent No.1-Bank no charge has been registered. It was, therefore, contended that the property in question not being “Secured Asset” within the meaning of provisions of Section 2(zc) of the Securitisation Act the provisions of the said Act cannot be made applicable and the petitioner cannot be deprived of the property in question.

8. Upon Notice being issued respondent No.1-Bank has put in appearance and tendered affidavit-in-reply. It is accepted fact that respondent No.1-Bank is not in possession of the original title deed to the property in question, namely, the Conveyance Deed executed by Gujarat Housing Board in favour of respondent No.3. Respondent No.1-Bank is in possession of xerox copies of the deed lodged with the Registering Authority and a declaration cum undertaking by respondent No.3 stating that as and when the original Conveyance Deed shall be made available by the Registering Authority, respondent

No.3 shall produce the same before respondent No.1-Bank. It is also an admitted position between the parties that after receipt of the original Conveyance Deed from the Registering Authority respondent No.3 has parted with the said deed in favour of the petitioner instead of handing over the same to respondent No.1-Bank.

9. On the basis of the aforesaid facts the learned advocate for respondent No.1-Bank has placed reliance on the definition of the term “Secured Asset” within the meaning of Section 2(zc) and “Security Interest” within the meaning of Section 2(zf) of the Securitisation Act. According to the learned advocate for respondent No.1-Bank the aforesaid two definitions make it clear that by whatsoever means once a security interest is created in an asset that asset becomes a secured asset entitling a Bank or a Financial Institution to act under provisions of the Securitisation Act. That in the present case, the Security Interest has been created in favour of respondent No.1-Bank by parting with a copy of title deed to the property in question

coupled with the declaration that the original title deed shall be tendered on record as and when available to the borrower, namely, respondent No.3.

10. To appreciate the contention raised by respondent No.1-Bank the definitions of the two terms “Secured Asset” and “Security Interest” may be considered. The definitions read as under:-

> *(zc) “secured asset” means the property on which security interest is created”;*
>
> *(zf) “security interest” means right, title and interest of any kind whatsoever upon property, created in favour of any secured creditor and includes any mortgage, charge, hypothecation, assignment other than those specified in section 31;*

11. On a plain reading the meaning of secured asset is the property on which security interest is created. The term security interest means right, title and interest of any kind whatsoever upon property created in favour of any secured creditor and includes any mortgage, charge, etc. Hence, the limited question that is to be considered is whether

any security interest has been created in favour of respondent No.1 -Bank. In other words, whether any right, title and interest of any kind whatsoever upon property has been created in favour of respondent No.1-Bank. Admittedly, no charge has been created. Whether a copy of the Conveyance Deed simplicitor can create any right, title and interest in favour of any person is the basic issue. The only question that is to be raised and answered is : whether on basis of such xerox copy of the deed respondent No.1-Bank could have dealt with the property in any manner whatsoever on the ground that a right, title and interest in the property had been created in favour of respondent No.1-Bank. The answer has to be in the negative. More particularly, bearing in mind the undisputed fact that the original title deed to the property has been parted with in favour of the petitioner by respondent No.3. The declaration given by respondent No.3 to respondent No.1-Bank may at the best give respondent No.1-Bank a right to initiate appropriate legal action against respondent No.3, but such a declaration cannot constitute any right, title and interest in favour of respondent No.1-Bank to the

property in question.

12. The learned advocate for respondent No.1 has placed reliance on the decision of High Court of Kerala in the case of *C.Assiamma V/s. State Bank of Mysore and others* AIR 1990 Kerala 157 to contend that merely because original document has not been deposited it cannot mean that equitable mortgage is not created. The decision has to be read in context of the facts which were before the Court. In the said case, as per the original title deed the donor has gifted properties to various persons, one of the properties being gifted to the mortgagor. The mortgagor has deposited a registration copy of the title deed and other relevant documents with the Bank. It was in that context that the Court held that since properties were gifted to many persons, all of them could not have the original gift deed i.e. title deed and in the circumstances, the registered copy of the title deed which was registered with the Registering Authority carried the same evidenciary value as the original deed in the circumstances.

13. In the facts of the present case, it is nobody's case that there are various persons owning the property in question and hence, respondent No.3 was not in possession of the original deed. In fact as admitted by respondent No.1-Bank a declaration had been furnished by respondent No.3 that the original deed shall be produced on receiving the same from the Registering Authority. Therefore, the decision of Kerala High Court cannot carry the case of respondent-Bank any further.

14. The learned advocate for respondent No.1-Bank has also raised the contention that the petitioner having availed of remedy of filing a suit cannot be permitted to approach this Court, and even otherwise, it is always open to the petitioner to avail of the statutory alternative remedy by way of appeal under Section 17 of the Securitisation Act. This contention would merit consideration provided respondent No.1-Bank is in a position, prima-facie, to establish that it is in possession of a secured asset on the basis of which the Bank is entitled to invoke provisions of the Securitisation Act. As

noticed hereinbefore, the principal requirement of Section 13 of the Securitisation Act is not fulfilled. Section 13(1) of the Securitisation Act talks of enforcement of security interest. Hence, in the circumstances, respondent No.1-Bank was required to establish that a security interest was created in favour of respondent No.1-Bank. The facts of the present case show otherwise. In absence of any security interest in favour of respondent No.1-Bank there can be no question of enforcement of any security interest in accordance with provisions of the Securitisation Act. In the circumstances, it is not possible to accept the contention that the petitioner must be relegated to avail of alternative remedy of appeal before the Tribunal under provisions of Section 17 of the Securitisation Act, when the said Act itself cannot be invoked by respondent No.1-Bank in the case of the petitioner. In so far as the remedy of filing of suit is concerned, it is an accepted fact that the suit stands withdrawn.

15. In the aforesaid facts and circumstances of the case, it is not necessary to record the other

contentions raised on behalf of respondent No.1-Bank as they are relatable to establishing the case of respondent No.1-Bank vis-a-vis respondent No.3 leaving it open for respondent No.1-Bank to initiate appropriate action in accordance with law against respondent No.3.

16. It is an accepted position that constructive possession of the property in question has been taken by respondent No.1-Bank. In the circumstances, the constructive possession of respondent No.1-Bank shall continue without respondent No.1-Bank being permitted to dispossess the petitioner of the property in question, subject to respondent No.1-Bank being in a position to establish any collusion between respondent No.3 and the petitioner to defraud respondent No.1-Bank. The learned advocate for the petitioner has made a statement, under instructions, that the petitioner does not intend to dispose of the property or alienate the property in any manner whatsoever and hence, no further directions are necessary in this regard in light of the statement made. The learned advocate for the petitioner also

undertakes to file an undertaking to the aforesaid effect by the petitioner within a period of ten days from today.

17. In the result, the petition is allowed in the aforesaid terms. Rule made absolute accordingly. There shall be no order as to costs.

(D.A.MEHTA, J.)

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